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No. 87-936

In the Supreme Court

OF THE

United States

MARY M. WITTEMAN,
Petitioner,

VS.

JACK BARRY CABLE TV,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In its Opposition to Mrs. Witteman's Petition for Writ of Certiorari ("Opposition"), Respondent mischaracterizes both the California Court of Appeal's decision herein and the nature and theory of Mrs. Witteman's case, necessitating this Reply.

1. The Court of Appeal's Decision Makes Clear that Mrs. Witteman's Claim Is Federal and Constitutional in Character

Respondent's Opposition attempts to deny the constitutional dimension of Mrs. Witteman's claims. Opposition at 1-3, 5-7, and *passim*.

The California Court of Appeal's decision makes it immediately clear, however, that Respondent's attempt must fail. At the beginning of its opinion, the California Court of Appeal discussed for two paragraphs this Court's decision on the constitutional taking issue in a six year old case involving cable television.

Witteman v. Jack Barry Cable TV, 183 Cal. App. 3d 1001 (opinion deleted), 228 Cal. Rptr. 584, 587, 192 Cal. App. 3d 1619, 1624 (1986), reprinted at Appendix C-4 to Petition for Writ of Certiorari to the California Court of Appeal (hereinafter "Petition"), citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (hereinafter "*Loretto*").

The California Court of Appeal understood full well the holding of this Court in *Loretto*

> . . . that a New York statute requiring the nonconsenting owner of real property to permit installation of cable television facilities therein constituted a taking of private property without compensation, prohibited by the United States constitution.

Petition Appendix at C-4. The Court of Appeal concluded that Mrs. Witteman "commenced this litigation in reliance, at least in part, on *Loretto*." *Id.* Contrary to Respondent's contentions (Opposition at 2), Mrs. Witteman has argued and relied on *Loretto* from the trial court (in opposition to summary judgment) forward.

Mrs. Witteman clearly asserted her rights, under *Loretto* and the Fifth and Fourteenth Amendments (see below), before the Court of Appeal, and the Court of Appeal just as clearly rejected those rights. Petitioner submits that the Court of Appeal deemed a federal question "to be before it, [and] actually entertain[ed] and decide[d] that question adversely to the federal right asserted." *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 96, 98, 82 C. Ed 688 (1937). Where that is the case, "this Court has jurisdiction to review the judgment." *Id.*

2. The Court of Appeal's Decision Necessarily Negates Mrs. Witteman's Constitutional Right, Under the Fifth and Fourteenth Amendments, to Be Free of an Uninvited Physical Occupation of Her Property—And Thus the State Grounds Asserted by Respondent Are Not Independent

What is at issue here is Mrs. Witteman's constitutionally protected right to exclude uninvited[1] third parties from her property. Citing historical taking analysis, this Court in *Loretto* identified the forced entry of third parties as the essence of a taking: a taking occurs when permanent "entry [is] made upon the plaintiffs' lot." *Loretto*, 458 U.S. at 428, quoting from *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). A "taking has always been found" in "cases involving a permanent physical occupation" of plaintiff's land. *Loretto*, 458 U.S. at 428.

In fact, a taking has been found precisely in the situation where a third party invades a previously granted *easement*. In *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904) a telegraph company attempted to construct and operate its lines over a railroad's right of way. This Court then assumed that such invasion would be a taking, and held that the right of way "cannot be appropriated in whole or in part except upon the payment of compensation." *Id.* at 570, quoted with approval in *Loretto*, 458 U.S. at 430.

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[1] Were Respondent simply the extension of a traditional common carrier communications net, it might better be argued that Respondent was in fact "invited" when Petitioner granted an easement to General Telephone for public utility phone service. Respondent would still, however, have to clear the "one stock" hurdle of the common law apportionment cases. See Petition footnote 7, at page 10. In fact, Respondent is here not part of a common carrier communications net, and is not operating its facilities as "one stock" with the phone company. Rather, Respondent is an entrepreneur selling entertainment and advertising product to only a fraction of the houses it passes. Under the Court of Appeal's decision, there is nothing to stop the state and federal governments from granting similar access easements over Mrs. Witteman's property to any number of other entertainment and advertising entrepreneurs.

Later cases

> clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, roads, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

Loretto, 458 U.S. at 430 (citations omitted).

In the instant case, the cable company, under government sponsorship, has accomplished an "actual taking of possession and control" of easement rights over Mrs. Witteman's property. *See United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951). In so doing, federal and state government has imposed on Mrs. Witteman an even more onerous servitude than was found to be a taking in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (physical *invasion*, but not permanent *occupation* of property). In that case, the imposition of a navigational servitude took from the underlying landowner the landowner's *right to exclude*, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176; see also *id.* at 180 ("And even if the Government physically invades *only an easement* in property, it must nevertheless pay compensation") (emphasis added).

The Court in *Loretto* identified several of the "strands" of the property rights "bundle" which are "chopped through" by a permanent, physical occupation of property: the power to exclude, the power to control the use of the property (including presumably the right to grant non-interfering easements to third parties), and the owner's "expectation that he will be relatively undisturbed at least in the possession of his property." *Loretto*, 458 U.S. at 435-36 (adding that "to require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury").

Here, the challenged statutes, and the Court of Appeal's decision upholding them, chop through each of the above-identified strands of Mrs. Witteman's bundle of constitutionally protected property rights. They allow the cable company, and other

companies after it,[2] to "exercise complete dominion" over a significant segment of Mrs. Witteman's property.[3]

The Court of Appeal's Decision, even though it might purport to be based on a *state ground, necessarily negates Mrs. Witteman's constitutionally protected rights in dominion, privacy, and control over the uses to which her backyard is put.* Thus, the state property law and the constitutional "issues are intertwined in one federal question," as Mrs. Witteman clearly stated in her Petition (at 9), contrary to Respondent's contentions to the contrary. Opposition at 2.

3. The Court of Appeal's Decision Had No Fair or Substantial Basis Under California Law—And Thus The Court's State Ground, Even if Independent, is Not Adequate

Respondent claims that the California Court of Appeal's decision herein was supported by its previous decision in *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 804, 212 Cal. Rptr. 31 (1985), by "the Restatement's redaction of well-accepted common law," and by "other states' decisions." Opposition at 10. A closer look at this purported "authority" reveals it to be insubstantial and illegitimate, and directly contrary to established California law.

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[2] As previously noted, this Court's holding in *Preferred Communications v. City of Los Angeles*, ____U.S.____, 90 C. Ed. 2d 480, 106 S. Ct. 2034 (1986) raises the spectre that there will be more television cables in Mrs. Witteman's backyard. The *Loretto* court saw the potential for increased burden as a significant part of its analysis: "Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made." *Loretto*, 458 U.S. at 437; *see also id.* at n.14.

[3] As to the size of intrusion or the magnitude of the affected property rights necessary to trigger a taking, see *Loretto*, 458 U.S. at 437, n.13 ("telephone wire . . . strung across plaintiff's property without touching soil" is sufficient).

Salvaty and the "other states' decisions"[4] amount to no more than four recent cases by lower state courts (Opposition at 8-9), all of which involve cable television and most of which attempt to legitimize cable television's asserted right to use public utility easements by an *ad hoc* apportionment theory, with no citation to its common law antecedents.[5]

Rather than explore the common law of apportionment, the four cable television decisions rest their logic on a misreading of the Restatement of Property. Opposition at 8-9, citing 5 Restatement of Property, § 493 comment c (1944) (which in turn cites no case law whatsoever). Contrary to the logic of these cases, the Restatement's inference of apportionability is not a necessary conclusion from a finding of exclusivity; rather, exclusivity is a necessary (but not independently sufficient) prerequisite to ap-

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[4] As noted in the Petition herein (at 19-20), some state courts have not allowed cable to use public utility easements. Furthermore, in the analogous context of "forced entry" cases, *Loretto* has been found to apply, and cable's government-sponsored placement over private property to be a compensable taking. *See, e.g., NYT Cable TV v. Homestead at Mansfield, Inc.*, 214 N.J. Super. 148, 518 A.2d 748, 754 (1986) (acknowledging that statute similar in form to 47 U.S.C. 541(a)(2) works a taking, but finding compensation mechanism within the statute.).

[5] Had either the *Salvaty* court or the Court of Appeal herein considered the traditional common law "one stock" test in ruling on apportionment of easements, the result may have been quite different. *See* Petition at n. 7, including *Chandler v. Hart*, 161 Cal. 405, 417-18 (1911) (approving the traditional "one stock" test for the apportionability of easements, and noting that "it will not be presumed that [the servient owner] intended such right to be exercised by more than one unless he so declares").

Petitioner inadvertently mischaracterized the *Chandler v. Hart* case at footnote 7 of her Petition. The Court in *Chandler* approved of, but did not "apply," the "one stock" test, deciding that it was inapplicable to the facts of that case because of the unique nature of the oil business. *See also Stanton v. T.L. Herbert & Sons*, 211 S.W. 353, 356 (Tenn., 1919) ("We do not understand [*Chandler*] as disapproving *Lord Mountjoy's Case* [source of the 'one stock' rule]").

portionability. After exclusivity is found, the intention of the grantor to permit apportionment must still be established. Here there is neither exclusivity (see Petition at 5, 10), nor any manifest intent that the easements be apportionable. The Restatement itself states that "apportionability of the easement will not be assumed in the absence of a clear indication to the contrary," and that the servient property owner usually "retains the power to create like privileges in others." *Id.* at comment d.

More importantly, the Restatement is not the law of the land in California. California law is. Here, the Court of Appeal's reliance on the Restatement in concluding that public utility easements "have been deemed 'exclusive' vis-a-vis their grantors" (Court of Appeal opinion at Appendix C-6 of Petition) is clearly inconsistent with the California Supreme Court's ruling that

> No intention to convey such a complete interest [exclusive easement] can be imputed to the owner of the servient easement in the absence of a clear indication of such an intention . . . An "exclusive easement" is an unusual interest in land; it has been said to amount to almost a conveyance of the fee . . . It is not necessary for [the servient owner] to make any reservation to protect his interests in the land, for what he does not convey, he still retains. Furthermore, since he retains the right to use the land reasonably himself, he retains also the power to transfer those rights to third persons.

Pasadena v. California-Michigan Land and Water Co., 17 Cal. 2d 576, 578-79 (1941) (citations omitted) (hereinafter "*Pasadena*"). The Court here refused to consider *Pasadena.*

The legislative and judicial decisions obtained by the cable television industry to date stand this established law on its head, and violate all of the constitutional property protections described above. The State has not merely "regulated" the use of Mrs. Witteman's property, as Respondent suggests (Opposition at 14), but it has "*ipse dixit* . . . transform[ed] private property into public property without compensation," an approach consistently rejected by this Court. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Where the State Court of Appeal overlooks obviously controlling and generally accepted law, its decision cannot be said to be adequate. *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 464, 475-76 (1919).

4. Respondent's Attempt to Distinguish the *Pasadena* Case From That at Bar Is Wholly Without Basis

Respondent's extended attempt to distinguish on its facts the case of *Pasadena v. California-Michigan Land & Water Co.*, *supra* (1941) from the instant case finds no basis whatsoever in the facts or holding of the *Pasadena* court. Opposition at 10-14.

First, Respondent purports to ground a large part of its effort on the text of the dissenting opinion in what was apparently a 4-2 decision of the California Supreme Court. *See* Opposition at 11. In this, Respondent mischaracterizes the dissenting opinion. Respondent states that "[a]ll apparently conceded that the servient estate also had the right to lay water pipes for its own use in the same strips of land." Id., citing *Pasadena*, 17 Cal. at 592 (dissent). The majority is silent on this point, and Petitioner reads the cited page of the dissent to state the exact opposite of what Respondent claims.

Respondent also mischaracterizes the central issue in *Pasadena*, claiming that it concerned the "interfere[nce] with prior easements" rather than whether the prior easement was exclusive. Opposition at 12. Pasadena, however, premised its argument on the theory that the "owners of the servient tenements had no power to grant easements similar to plaintiff's in the same strip of land." *Pasadena*, 17 Cal. 2d at 577. California-Michigan joined the issue by "denying among other things that the city ever possessed or enjoyed any right to exclusive use of the easements." *Id.* at 586. The Court of course decided for California-Michigan.

Respondent further misleads this Court by stating that "[i]n *Pasadena*, an easement to run water pipes *in the same land* had been granted to defendant even before plaintiff obtained that right." Opposition at 13 (emphasis added). The situation was exactly the reverse: *in the relevant portion of land*, Pasadena had the first easement. While it is true that California-Michigan did

have other easements ("six foot easements") in the general area for "pipe line purposes" (17 Cal. 2d at 585, 588), the five foot easement at issue (along Arcadia Avenue) was granted first to Pasadena, and then subsequently to California-Michigan ("an easement practically identical with the easement already owned by the city"). *Id.* at 584-86.

Finally, Respondent quotes from the Charter of the City of Los Angeles, Section 220(1), for the implied proposition that electricity service, but not water service, is monopolistic in nature. Opposition at 13, n. 13. In truth, however, the quoted portion of Section 220(1) speaks of water and electrical service in the same breath: ". . . for the purpose of supplying the city and its inhabitants with *water and* electric energy." (Emphasis added.) Unfortunately, Respondent chose to delete the two underlined words from its quotation of that Section.

In sum, the *Pasadena* court makes no distinction between water and electrical service, and its holding is squarely applicable to the facts in the case at bar. In ignoring this authority, the California Court of Appeal (and, tacitly, the California Supreme Court) has suddenly and unpredictably altered the settled expectations of California easement law, violating in the process Mrs. Witteman's constitutional rights.

CONCLUSION

Apparently responding to some perceived technological imperative, several lower state courts have sought to give the cable industry *carte blanche* access to easements over private backyards. In so doing, however, they have trampled on the servient landowners' constitutionally protected property rights, and drastically and impermissibly altered the common law.

This Court should not join the rush to accomodate the cable television industry at the cost of discarding established constitutional and common law principles. Certiorari should be granted. At a minimum, the case should be remanded to the California courts for a consideration of the *Pasadena* case and other issues left unconsidered and undecided by the California courts.

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Respectfully submitted,

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